United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1022

To be argued by
JEFFREY HARRIS

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1022

UNITED STATES OF AMERICA,
Appellee,

—v.—

WILLIAM SANGEMINO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

William Sangemino appeals from a judgment of conviction entered on December 29, 1975 in the United States District Court for the Southern District of New York after a two-week trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Indictment 74 Cr. 928, filed September 30, 1974, charged William Sangemino in three counts with conspiring to defraud the United States, in violation of Title 18, United States Code, Section 371; bribery, in violation of Title 18, United States Code, Section 201(c); and making false statements before the Grand Jury, in violation of Title 18, United States Code, Section 1623. Indictment 75 Cr. 127, filed February 5, 1975, charged Sangemino in one count with conspiring to defraud the United States, in violation of Title 18, United States Code, Section 371, and superseded Count One of Indict-

ment 74 Cr. 928. On February 14, 1975, Indictments 74 Cr. 928 and 75 Cr. 127 were consolidated for trial, and Count One of Indictment 74 Cr. 928 (the conspiracy count) was dismissed with the consent of the Government.

On April 8, 1975 the trial commenced, and it ended on April 18, 1975 when the jury found Sangemino guilty on all three counts. On December 29, 1975, Sangemino was sentenced to concurrent four year terms of imprisonment on the conspiracy count and the bribery count, as well as a consecutive six month term of imprisonment on the false statement count.

Sangemino is presently enlarged on bail pending this appeal.

Statement of Facts

The Government's Case

A. Summary

The proof at trial established overwhelmingly that, while on active duty in the United States Army assigned to the Selective Service System, Major William Sangemino received many thousands of dollars in illegal bribes to assist interested "clients" in the obtaining of deferments, compassionate discharges and reassignments from the armed forces. Sangemino's co-conspirator Nathan Lemler would interview all "clients" desirous of avoiding service in the armed forces and then contact Sangemino to agree on the best method of insuring that the client would not have to serve. The illegal methods used by Sangemino included arranging for the clients to fail their pre-induction physicals and to receive fraudulent hardship discharges or transfers.

B. The scheme and its origins

In late 1966 or early 1967 Nathan Lemler and his wife opened a college placement, counseling and tutorial school in Nassau County known as the Academic Improvement Center, later incorporated under the name of Remedial Education, Inc. Shortly thereafter, the emphasis of the business became medical and dental school placements.* Lemler testified that, when a client came to him, he would interview him and set a fee of anywhere between $1500 and $30,000 per placement. In each case, Lemler gave his client a written contract providing for a full refund if he was unsuccessful in placing the client. (Tr. 54-58).**

In 1968 a client came to Lemler who was about to be drafted because he was not carrying sufficient credits at college. Lemler then looked up the address of Selective Service headquarters in New York City and without appointment appeared at their offices located at 26 Federal Plaza. He asked to speak to someone and was shown into the office of the defendant Major William Sangemino. After the problem was explained, Sangemino assured Lemler he would assist. Lemler then told Sangemino he wanted to make a contribution to Sangemino's favorite charity. Sangemino responded that his favorite charity was Boy's Town. Lemler then took three $100 bills and placed them in Sangemino's mail tray. Sangemino walked Lemler to the elevator and told him not to hesitate to seek his assistance in the future. (Tr. 58-64).

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* Lemler claimed to be a Phd in biochemistry with vast educational experience. He even testified before legislative committees of both the United States Congress and New York State legislature as an expert on medical school admissions. (Tr. 56).

** The designation "Tr." refers to the trial transcript; "GX" to Government Exhibits; "Br." to the defendant's brief; and "A." to the defendant's appendix.

Between 1968 and early 1972 when Remedial Education, Inc. was closed by a court order, Sangemino assisted Lemler in 401 Selective Service matters and was paid approximately $50,000.* As with graduate school placements, every Selective Service client received a written contract with a money-back guarantee.** Of the 401 cases Lemler was successful in 400 cases. (Tr. 64-74).

After interviewing a client Lemler would call Sangemino, discuss the case, and then proceed with an agreed upon course of action. He made payments to Sangemino in the men's room near the Selective Service offices, and on a few occasions in the Major's office or at a nearby restaurant. On several occasions Lemler directed his chauffeur, Charles Mofschowitz, or a female employee, Ruth Mear, to deliver payments to Sangemino. (Tr. 74-77).

C. The case of Dr. Gerald Weiss

In 1969, Lemler acquired a client named Dr. Gerald Weiss who was on active duty with the United States Army as a doctor and had received orders to go to Viet Nam. Lemler set a fee of $7500 to get him a stateside transfer.

After collecting his fee in cash, Lemler called Sangemino and told him the problem. Lemler and Sangemino agreed that they would rig a phony suicide attempt by Weiss' mother in order to get Weiss a reassignment. Lemler thereafter called Dr. Myron Teitelbaum, a psychiatrist working with him, and arranged the details in-

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* Because the indictment which was filed on September 30, 1974 was circumscribed by a five year statute of limitations, Count Two charged bribery only from on or about October 1, 1969. Lemler testified that he paid Sangemino about $30,000 during the period from October 1, 1969 until early 1972.

** GXs 1 and 2 are examples of such contracts.

cluding the admission of Weiss' mother to the South Oaks Mental Hospital. After this was accomplished, Lemler called Sangemino and advised him that Mrs. Weiss was institutionalized. Dr. Weiss later called Lemler and told him he had received a permanent stateside transfer.

Lemler paid Sangemino $1000 or more in the men's room at 26 Federal Plaza in connection with this case. (Tr. 77-86).

D. The case of David Zweibel

In late 1968 or early 1969 David Zweibel became Lemler's client through Zweibel's father-in-law David Blank. Blank told Lemler that Zweibel was in the Army and, as a result, Blank's daughter (Zweibel's wife) was impossible to live with. Blank asked Lemler to obtain a discharge for Zweibel.

After setting and collecting a $3500 fee, Lemler called Sangemino. Sangemino and Lemler agreed to apply for relief for Zweibel based upon a mentally ill wife. Lemler had Mrs. Zweibel become a patient of Dr. Teitelbaum. Mrs. Zweibel was thereafter told to go to a motel, call Lemler and tell him she was running away. Mrs. Zweibel did as instructed, and Lemler then picked her up, drove her to the South Oaks Mental Hospital and had her admitted as a potential suicide.*

Zweibel received his discharge, and Lemler paid Sangemino approximately $800. (Tr. 866-91; GX 18A).

E. The case of Joseph Petro, Jr.

In the fall of 1969 Joseph Petro, Sr. came to Lemler and told him that his son Joseph, Jr. was then in Officer

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*GX 18A was the hospital admission record for Janice Zweibel dated July 2, 1969.

Candidate School and that he feared that upon his son's graduation, he would be shipped to Viet Nam. Lemler went to see Sangemino, and they decided to have Mrs. Josephine Petro, Joseph Sr.'s wife, admitted to South Oaks Mental Hospital. Mrs. Petro then visited Dr. Teitelbaum and was admitted to South Oaks.* At about this time Lemler paid Sangemino approximately $1000. However, Mrs. Petro left South Oaks before the discharge came through. Lemler refunded the $9000 fee, but did not receive back the $1000 he had already given the defendant.

About a month later Mrs. Petro came to Lemler, stating that her son had orders to go to Viet Nam and asking him again to take the case.** Lemler agreed to try again, and then spoke to Sangemino. Sangemino arranged a meeting for Lemler at the Pentagon. Lemler and Lt. Joseph Petro, Jr. went to the Pentagon and had the meeting. However, before the matter was resolved Lt. Petro, unbeknownst to his parents or Lemler, requested overseas duty and went to Viet Nam. (Tr. 99-105).***

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* Government exhibit 17A was the hospital admission record for Josephine Petro dated January 10, 1970.

** GX 14 was a tape recording made February 18, 1970 by Lemler of this conversation with Mrs. Petro. It was admitted as a prior consistent statement after Lemler's testimony had been attacked as a recent fabrication. (Tr. 477-80).

*** Joseph Petro, Jr. testified that he entered the Army in late 1968 and in late 1969 graduated from Office Candidate School. After graduation, he went home on 30 days compassionate leave. Petro stated that, while at home, he and Lemler went to the Surgeon General's office at the Pentagon to discuss his case. After this trip Lemler told Petro that they would work through Major Sangemino's office. Later during the same leave period, Petro, on Lemler's instructions, picked up a sealed envelope from Lemler's office and delivered it to Sangemino at 26 Federal Plaza. (Tr. 575-79, 581).

F. The case of Edward Resnick

In 1970, Mrs. Leonore Resnick approached Lemler and asked him to help get her son Edward out of the draft and into medical school. Lemler initially arranged for Edward to go to medical school in Spain. Resnick, however, returned home after one-week in Spain and thereafter received a notice to report for a pre-induction physical examination. Lemler was informed of this scheduled examination by Mrs. Resnick on or about February 5, 1971. Resnick failed to appear, and on February 23, 1971, Mrs. Resnick called Lemler's office and advised that Edward had been ordered to report for induction on March 9th. On March 24th, Major Sangemino called Lemler's office and left word to tell the local board, located in Nassau County, that Lemler was a close family member and Edward would be going to medical school.* Resnick did not report for induction. (Tr. 108-13, 118, 131-33, 135; GX 3, 3A, 3B).

Shortly thereafter Resnick received another notice for a physical examination. When Lemler informed Sangemino of this fact, Sangemino gave Lemler his business card with a notation on the back written by Sangemino stating that a Mr. D'Ambrosio should call him about this matter.** Lemler was instructed to give the card to Resnick and have Resnick present it to D'Ambrosio at the Armed Forces Examining Station (AFEES). Resnick received this business card and then took his physical examination. He was later advised that he was unfit for induction. (Tr. 114-18; GX 4).

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* The February 23d and March 24th phone calls were proved by the introduction of Lemler's telephone message book for 1971.

** GX 4 is the card that Sangemino gave Lemler.

G. The case of Richard Falcoff

Sometime during 1970, Lemler agreed to get Richard Falcoff a Selective Service deferment. After collecting his fee, Lemler spoke to Sangemino about the case. It was decided to try and get Falcoff deferred due to a physical disability. Ultimately epilepsy was decided upon. Sangemino received about $1,500 for his assistance in the Falcoff. (Tr. 139-44).*

H. Corroboration of Lemler's Testimony

The principal Government witness at trial was Nathan Lemler, who was Sangemino's partner and an architect of this fraudulent scheme. It was important, of course, to corroborate Lemler's testimony. This was done in a number of ways.

First, Lemler identified Government Exhibit 3A as telephone messages his secretaries received from Sangemino for the year 1971. Several messages referred to the Resnick case. Lemler also testified that Sangemino's message of June 15, 1971, "Thanks for Tickets," referred to two tickets for an all expense paid vacation to Puerto Rico that Lemler gave Sangemino. A message in December 1971 reflected the fact that Lemler told his secre-

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* Falcoff's Selective Service record reflected that while at college in Kentucky, Falcoff had been called for a pre-induction physical. He passed that physical on April 28, 1971, filing a form on that date stating he had never had epilepsy and denying any serious illness. In November Falcoff was re-examined as was done with all draftees on the day of induction. This took place at the Armed Forces Examining Station in Brooklyn, New York. Falcoff told the doctor there that he had had petit mal epilepsy for five years. He had no medical letters to support this claim. Not surprisingly, however, with Lemler's and Sangemino's assistance, Falcoff was found unqualified for induction, to be re-examined in one month. Falcoff was never called back and never was inducted into the Army. (GX 6).

tary to tell Sangemino that he, Lemler, would see Sangemino after the first of the year with regard to money Lemler owed Sangemino. (Tr. 135-39).

Second, Lemler identified his signature in Government Exhibits 10 through 14 which were sign-in logs for 26 Federal Plaza. These exhibits reflected Lemler signing in as a visitor to Selective Service headquarters. (Tr. 149-53).

Third, on March 20, 1974, Lemler had volunteered to wear a tape recorder and engage Sangemino in conversation. The resulting tape recording was admitted into evidence and played for the jury. (GX 8). During that conversation, Lemler told Sangemino that he thought the Government had Lemler's records reflecting payments at Selective Service. Sangemino answered by suggesting that Lemler could explain that those records were simply the means by which Lemler justified his fees to his clients. Sangemino sounded desperate when Lemler asked whether any money could be traced to Sangemino's bank accounts or stock.* Sangemino ended by telling Lemler that if he weakened it would be a whole new ball-game. (Tr. 154-59; GX 8, 9).

Fourth, on the question of whether bribes had been paid, a number of other witnesses supported Lemler's testimony. Charles Mofschowitz testified that he was employed by Lemler as a chauffeur from January to October 1971. During that period he drove Lemler to 26 Federal Plaza on six or seven occasions. On two occasions Lemler instructed Mofschowitz to go to 26 Federal Plaza by himself. On the first of these occa-

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* As the trial judge noted in his post-trial opinion, "the cold words of this transcript cannot convey the desperate quality of this conversation. It must be heard to be understood." (A. 549a-50a).

sions, around March 1971, Lemler gave Mofschowitz a sealed envelope and told him to deliver it to Major Sangemino. Mofschowitz did this. In the middle of June, 1971, Lemler gave Mofschowitz $300 and told him to deliver it to Sangemino. Mofschowitz had Lemler put the money in an envelope and seal it. Mofschowitz took the envelope and handed it to Sangemino at 26 Federal Plaza. Mofschowitz also identified his signature in the 26 Federal Plaza sign-in log dated June 15, 1971. (Tr. 483-92; GX 11).

Ruth Mear testified that she was employed by Lemler in 1969. On one occasion she accompanied Lemler to 26 Federal Plaza and was introduced to Major Sangemino by Lemler. She was then asked to wait while Lemler and Sangemino met behind closed doors. About one week after the first visit, Lemler asked Mrs. Mear to deliver a sealed letter to Major Sangemino at 26 Federal Plaza which she did. She did not know the contents of that envelope. (Tr. 524-28).*

Harriet Tollin testified that she was Lemler's daughter and had worked for her father from the fall of 1970 to the beginning of 1972. On about three occasions Mrs. Tollin accompanied her father to 26 Federal Plaza and waited for him in the car. Upon returning to the car on one occasion, Lemler told his daughter that he had to go into the men's room to pay Sangemino his money.**

The Government also called Major Robert Keup. Major Keup testified that he was assigned to Selective Service Headquarters in Albany, New York and had

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* Lieutenant Petro also delivered a sealed envelope from Lemler to Sangemino. See p. 6, *supra*.

** Mrs. Tollin also testified that she had broken off any relationship she had with her father and had in fact testified against him at his trial in Nassau County. (Tr. 509-14).

been so assigned since 1968. The jurisdiction of the New York State Headquarters included all of New York State, including Nassau and Suffolk Counties, with the exception of New York City. New York City was a separate distinct entity for Selective Service purposes. Keup testified that any problem or appeals from decisions of local draft boards located in New York State, excluding New York City, were within his jurisdiction and there would be no reason for New York City Headquarters to become involved. (Tr. 543-49).*

The Defense Case

Colonel Paul Akst, the Director of the New York City Selective Service Headquarters, testified that Sangemino worked for him from 1966 until the present. Akst described the induction procedures during the years 1969 through 1972. He stated that Headquarters hired four liason officers to act as liason with the Armed Forces Examining Stations (AFEES), which were run by the Army. During this period he and others sent messages to the liason personnel about specific cases. But it was not possible, he claimed, to influence a decision of the local board or the AFEES. This was so because local board decisions were not reviewed by Headquarters and the AFEES used over 200 contract (non-military) doctors and it was impossible to know which one would examine what registrant. Akst stated that he, as State Director, had to personally make recommendations as to hardship discharges but had nothing to do with compassionate reassignments. Finally, Akst testified to Sangemino's excellent reputation in the community. (Tr. 609-36).

Joseph Winckler testified that he was an employee of the Selective Service Headquarters in New York City

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* All of the draft cases testified to at the trial concerned problems with draft board outside the City. Sangemino's intervention was therefore irregular to say the least.

and as such had occasion to call the liason men at the AFEES about various cases. He stated that it was impossible to influence the outcome of any particular case. (Tr. 657-59).

On cross-examination Winckler stated that he involved himself only in cases of New York City registrants and had never called AFEES about a registrant registered outside New York City. (Tr. 664-67).

Stephen Marudas, another fellow employee of the defendant, stated that he had met Lemler in Sangemino's office about four times when specific cases were discussed. He noted that the door was always open and that no money or envelopes changed hands. (Tr. 704-10).

Several of the AFEES liason officers testified that they were employed by Selective Services Headquarters in New York City to act as liason officers between Selective Service and the AFEES. They all stated that Sangemino and others called them about cases to be examined but that they never did, or were requested by the defendant to do, anything improper. (Tr. 711-31, 738-47a).

Several witnesses who were private draft counselors or aides to Congressmen testified that they had frequently called upon the defendant with Selective Service problems and questions. They all found Sangemino helpful and courteous. None of them ever offered the defendant money or anything of value for his assistance, and nothing was ever solicited by the defendant. (Tr. 749-804, 884-95).

Leonora Resnick testified that she was the mother of Edward J. Resnick and had paid Lemler $10,000 to get her son into medical school. She stated that Lemler gave her son Sangemino's business card (GX 4) but that her son never used it and got out of the draft due

to his overweight condition. Further, she never discussed with Lemler getting her son a medical Selective Service deferment, and she did not recall any correspondence with Lemler concerning the draft. (Tr. 674-83).

On cross-examination, Mrs. Resnick identified Government's Exhibit 1 as a copy of her contract with Lemler. When confronted with parts of the contract relating to Selective Service she stated that she had not read this one and one half page document before giving Lemler $10,000 in cash. When confronted with telephone call messages from herself to Lemler concerning her son's draft status, Mrs. Resnick respeatedly asserted that she did not remember the calls. She also claimed failure of memory as to whether she told an FBI agent that Edward was out of the country in medical school when he was in fact in Boston. (Tr. 683-96; GX 21).

The defendant testified in his own behalf and denied that he had ever accepted any money from Lemler for advice he provided. He further stated that he had never done anything to corruptly influence the outcome of Selective Service matters. (Tr. 930, 935, 946-47).

ARGUMENT

POINT I

The defendant's Grand Jury testimony was properly admitted into evidence.

Sangemino contends for the first time on this appeal that when he testified in the Grand Jury on March 20, 1974, he did not knowingly waive his right to counsel and privilege against self-incrimination. Accordingly, he urges that it was error to admit his Grand Jury testimony into evidence. This argument is frivolous.

At the trial, the Government introduced Sangemino's Grand Jury testimony as a predicate to establishing that the testimony was false as charged in Count Three of Indictment 74 Cr. 928. The transcript of the testimony was admitted into evidence for his purpose without objection, a fact which has gone unacknowledged in Sangemino's brief. (Tr. 588-89; GX 16).*

Sangemino's failure to object to the introduction of the evidence below forecloses any objection on appeal unless plain error was committed in allowing the transcript to be introduced. *United States* v. *Rivera*, 513 F.2d 519, 526 (2d Cir. 1975); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966). Here, there was simply no error at all.

The defendant, an educated man, a Major in the United States Army, and a man involved in the preparation of Selective Service cases within the criminal justice system, was subpoenaed before the Grand Jury. Although not in "custody," he was carefully and thoroughly advised of all of his constitutional rights. He was told that he had a right to refuse to answer any question; that anything he said might be used against him in a court of law; and that he had a right to have an attorney present outside the Grand Jury room whom he could consult at any time and that if he could not afford an attorney one would be appointed for him. After being advised of each of his rights, Sangemino was asked if he understood them, and he said that he did. He was further

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* Sangemino might point to this failure to object as evidence of trial counsel's incompetence (see point IV *infra*). However, the fallacy of such a position is readily apparent when it is realized that the defense position was that there was no perjury before the Grand Jury and no reason to object. As a matter of fact, Sangemino testified consistently with his Grand Jury testimony at trial.

asked if he would like an adjournment to secure counsel, and he was advised that he was a target of a bribery investigation and that there was a "substantial likelihood" that he would be indicted. He was also told of the obligation to testify truthfully and that perjury was a serious crime.*

Considering the education and obvious intelligence of Sangemino and the comprehensiveness of the warnings given, Sangemino's claim of an unintelligent and coerced waiver of his rights to remain silent and right to counsel is frivolous. *United States* v. *Mingoia*, 424 F.2d 710, 713-14 (2d Cir. 1970); *United States* v. *Capaldo*, 402 F.2d 821, 823-24 (2d Cir. 1968). *Cf. United States* v. *Jacobs*, Dkt. No. 75-1319 (2d Cir., Feb. 24, 1976). Finally, the fact that this claim is being made for the first time on appeal is indicative of its lack of substance.

POINT II

The pre-indictment tape-recorded conversation between Sangemino and Lemler was properly received in evidence.

On March 20, 1974, immediately after appearing before the Grand Jury, Sangemino met with Nathan Lemler. With Lemler's consent, the Government recorded this conversation using a tape recorder concealed on Lemler's person. This tape recording was subsequently introduced into evidence by the Government at trial. Sangemino argues, as he did unsuccesfully in a pretrial suppression motion, that the admission of this recording was error, because as a government agent Lemler should have given him his *Miranda* warnings and Lemler's

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* The full transcript is set out in the Appellant's Appendix at pages 60a-64a.

speaking with him without counsel violated the rule enunciated in *Massiah* v. *United States*, 377 U.S. 201 (1964).

Miranda v. *Arizona*, 384 U.S. 436 (1964), requires that certain now familiar warnings be given a suspect when he is "deprived of his freedom of action in any significant way during an interrogation." *Id.* at 444. By no stretch of the imagination can it be said that Sangemino was deprived of freedom of action when he spoke with Lemler. See *United States* v. *Viviano*, 437 F.2d 295, 300-01 (2d Cir.), *cert. denied*, 402 U.S. 893 (1971); *United States* v. *DiLorenzo*, 429 F.2d 216 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971); *United States* v. *Knohl*, 379 F.2d 427, 442-43 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967). Sangemino was not in custody nor under any subtle compulsions to speak. *Hoffa* v. *United States*, 385 U.S. 293, 303-04 (1966). He was free to come and go as he chose. He was also free to choose whether or not to speak to Lemler.

In that circumstance, this Court's decisions in *United States* v. *Viviano*, *supra*, is directly in point:

> "While one may assume that appellant would not have admitted having taken bribes from taxpayers had he been aware of [the undercover agent's] true purpose, this does not mean that Viviano should have been given the Miranda warnings. He was not in a situation where he was impelled through weariness or fear of further pressure to say what his interrogator wanted him to say or to make inculpatory admissions, whether true or not, to stop the police from badgering him and leave him alone. He was under no police compulsion to meet with [the agent]. Once there he was free to say nothing or leave any time he chose. The real inducing cause of his making self-incriminating statements was his eagerness to avail himself of a chance to conceal his past derelictions." 437 F.2d at 301.

Moreover, just prior to this tape-recorded conversation Sangemino had been fully advised of his rights in the Grand Jury.

Sangemino's argument that he was deprived of his right to counsel under *Massiah* is equally meritless. The right to counsel attaches at the commencement of adversary judicial criminal proceedings such as arraignment, indictment, information or preliminary hearing and not before. *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972); *United States* v. *Duvall*, Dkt. No. 75-1225, slip op. 2123, 2130-34 (2d Cir., Feb. 26, 1976). Here, Sangemino was neither indicted, arrested nor otherwise charged in this case until some six months after this conversation. See *United States* v. *Gugliaro*, 501 F.2d 68, 74 (2d Cir. 1974); *United States* v. *Lemonakis*, 485 F.2d 941 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974). Furthermore, the implied argument that Sangemino could have been arrested because probable cause existed for his arrest and that the *Massiah* rule should be extended to include such situations has been carefully considered and rejected. *Hoffa* v. *United States*, *supra*, 385 U.S. at 309-10; *United States* v. *DiLorenzo*, *supra*, 429 F.2d at 219; *United States* v. *Knohl*, *supra*, 379 F.2d at 442; *United States ex rel. Molinas* v. *Mancusi*, 370 F.2d 601, 603 (2d Cir.), *cert. denied*, 386 U.S. 984 (1967).

Under the circumstances present here, the District Judge properly decided that there was no basis upon which to suppress the tape-recorded conversation between Sangemino and Lemler. (A. 54a-55a).

POINT III

The Government did not fail to meet its obligations under *Brady* v. *Maryland*.

Sangemino claims that the Government failed to comply with its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), in two respects. He argues first that he was deprived of an adequate opportunity to prepare a defense when the Government failed to turn over, prior to the day before trial, the Grand Jury testimony of Richard and Norman Falcoff, in which they claimed that Richard's failure of his pre-induction physical was not based on a fraudulent physical ailment but rather on a legitimate and long-standing epileptic condition. Secondly, Sangemino argues that the Government's failure to advise him that, prior to trial, Nathan Lemler had advised a fellow inmate at West Street how to feign insanity deprived him of an opportunity to use this information to impeach Lemler. These claims lack merit. Both assertions were raised by Sangemino in post-trial motions for a new trial, and in two thorough and exhaustive opinions, Judge Brieant denied the motions.*

A. The Falcoff situation

At trial Lemler testified that he and Sangemino had helped Falcoff get out of the draft due to an epilepsy claim. The Government corroborated this testimony by introducing Falcoff's Selective Service record which showed that he had been found fully qualified to serve after a physical examination in Kentucky; yet a short time later, he was found unqualified due to petit mal epilepsy.

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* The opinions are reproduced in full at pages 543a-81a and 685a-706a of appellant's appendix.

Sangemino claims, as he did below, that had he been given Falcoff's Grand Jury testimony prior to the day before trial, he would have known that Falcoff denied doing anything illegal and claimed he really did have epilepsy. Further, he asserts that he could have followed up on this lead which would have shown Lemler to be lying.

In rejecting this claim below, the District Court noted first that the defense had been shown Falcoff's Selective Service file, as well as a report finding that Falcoff had epilepsy when he was nine years old, on January 30, 1975 and February 10, 1975, well in advance of trial. (Tr. 146-48; GX 3597d; A. 541a). In that circumstance, Judge Brieant found that, since the Government's bill of particulars revealed that Falcoff was one of Lemler's clients whose case would arise at trial, and since the defense was put on notice that Falcoff was not inducted into the Army due to claimed epilepsy and that there was a medical report dated 1959 finding that Falcoff had petit mal epilepsy, "the crucial underlying facts were disclosed well in advance of trial." (A. 579a).

Since the Government had put the defendant on notice of the essential exculpatory facts well in advance of trial, see *Williams* v. *United States*, 503 F.2d 995, 998 (2d Cir. 1974), the Court properly found that the Government had not deliberately suppressed exculpatory evidence or ignored evidence of such high value that it could not have escaped its attention. (A. 576a-78a). See *United States* v. *Morell*, 524 F.2d 550, 553 (2d Cir. 1975); *United States* v. *Rosner*, 516 F.2d 269, 272 (2d Cir. 1975). Moreover, since the transcript of Falcoff's Grand Jury testimony "was replete with inconsistencies concerning his medical history and the nature of his involvement

with Lemler," * Judge Brieant also found that the transcript "was of dubious evidentiary value, which a prosecutor might readily have bypassed in discharging his *Brady* obligations." (A. 578a). Accordingly, the Court properly determined that the appropriate test to be applied was whether there was a significant chance that earlier disclosure of the testimony would have permitted skilled counsel to develop this information in such a way as to have induced a reasonable doubt in the minds of the jurors. (A. 578a). See *United States* v. *Morell*, *supra*, 524 F.2d at 553; *United States* v. *Rosner*, *supra*, 516 F.2d at 272; *United States* v. *Seijo*, 514 F.2d 1350 (2d Cir. 1975).

Applying that test to the facts of this case, the District Court concluded that there was no basis for infer-

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* For example Falcoff testified that although he had petit mal epilepsy when he was nine years old he held valid driver's licenses from three states and that on each license he swore that he did not have epilepsy; that although he claimed in 1971 to have had epilepsy for the past five years, he had not seen a doctor for that condition since 1959; that the family doctor had Falcoff on medication from 1967 to 1971 without seeing him; that although he was given the prescription by his family doctor in 1967, he did not initially fill it for *three* years; that he only took 2 pills of 25, threw away the remaining 23 pills and then renewed the prescription but could not remember where or when; that he went to Lemler only to gain admission to law school but that most of the phone messages between the Falcoffs and Lemler refer to his draft status; that in fact the last call between Lemler and the Falcoffs was in December 1971 and Falcoff did not even apply to law school until the beginning of 1972; that when he graduated college in the summer of 1971, he thought that Lemler could get him into law school in September 1971 although he had not taken the law boards or applied to any law school; that he told the induction center about his condition on the second time he was examined because he felt this would impede his service to the United States and place him in danger, but that he did not feel he was placing himself in danger behind the wheel of a car. In sum only a complete reading of this Grand Jury transcript reveals the incredible nature of testimony (A. 502a-40a).

ring that had more prompt disclosure been made, skilled counsel might have used the testimony to induce a reasonable doubt, since (1) the essential facts had been revealed well in advance of trial; (2) the Grand Jury transcripts were provided prior to trial and in more than enough time to yield information for use in the cross-examination of Lemler; (3) the defendant would likely have had difficulty in securing Falcoff's testimony even if he had been located;* (4) Falcoff's Grand Jury testimony was replete with inconsistencies and, if he had testified, his testimony would not have been particularly helpful; and (5) finally, the strong proof corroborating Lemler could not have been overcome.** (A. 578a-80a, 563a).

We respectfully submit that the District Court's factual findings are entirely correct and most certainly are not wholly unsupported by the evidence. See *United States* v. *Johnson*, 327 U.S. 106, 111 (1946); *United States* v. *Posner*, *supra*, 516 F.2d at 272-73; *United States* v. *Catalano*, 491 F.2d 268, 276 (2d Cir. 1974); *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

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* Falcoff had been named as an unindicted co-conspirator and the Court felt that, in light of his inconsistent Grand Jury testimony, he would likely have invoked his privilege against self-incrimination. (A. 563a).

** This finding is fully supported by the evidence. Lemler's testimony was extensively corroborated by the chauffeur, Mofschowitz, who testified to handing an envelope containing money to Sangemino, by Ruth Mear and Joseph Petro who delivered envelopes to Sangemino, by Harriet Tollin who was present when her father stated he had had to go to the men's room to pay Sangemino, by the documentary evidence such as the telephone messages, 26 Federal Plaza sign-in logs, Selective Service files, Lemler's contracts and Sangemino's business card, by the testimony that Sangemino acted outside his lawful jurisdiction and, of course, by the March 20th tape recording.

B. The DiGilio situation

In or about September 1974, Lemler instructed a West Street inmate in pre-trial custody how to feign insanity. Lemler almost immediately reported this to the United States Attorney's office in this district. This information was passed on telephonically by an Assistant United States Attorney to an Assistant United States Attorney for the District of New Jersey where the inmate, DiGilio, was to stand trial. After the verdict in this case Lemler was brought to the United States Attorney's office in New Jersey and subsequently testified at DiGilio's competency hearing.

Sangemino claims that he should have been informed of this situation, because (1) with knowledge that Lemler was familiar with medicine, he could have shown that Lemler did not need Sangemino's assistance and (2) this incident would have been valuable impeachment material.

In disposing of these post-trial claims, Judge Brieant found that the failure to reveal this information to the defense was not deliberate and that the evidence was not of such a value that its significance could not have escaped the prosecutor's attention. Accordingly, the Court determined that a new trial would only be appropriate if there was "a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." (A. 696a-97a). See *United States* v. *Morell, supra; United States* v. *Rosner, supra.*

In evaluating the effect which disclosure of the DiGilio information would have had, the Court quickly disposed of Sangemino's claim that this information could have been used to show that Lemler had the necessary medical

expertise to proceed with this scheme without Sangemino's assistance. The Court noted that the Government's theory at trial was not that Lemler relied on Sangemino for his medical expertise. Moreover, since Lemler testified at trial that he was a chiropractor, knew how to phony up x-rays and had studied biochemistry (Tr. 418), the defense knew that Lemler possessed medical expertise. (A. 692a-93a). As a result the Court found that the DiGilio situation "was not exculpatory of Sangemino in the least." (A. 692a).

The District Court found equally unpersuasive Sangemino's second claim that this incident could have been used to further impeach Lemler's credibility. Lemler, the Court found, had been impeached by prior convictions for fraud-related activities, and other conduct such as bribery, bigamy and false representations which did not result in convictions. Lemler also fully admitted his hope that his testimony would work to his benefit with regard to his long prison sentence. Since Lemler had been shown to be a scoundrel, the Court found that evidence of one more instance of chicanery would have been merely cumulative and of minimal value to the defense. *United States* v. *Pfingst*, 490 F.2d 262, 276 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974); *United States* v. *Gugliaro*, *supra*, 501 F.2d at 73-74. Moreover, the Court found that Lemler's testimony had been extensively corroborated.

The Court concluded:

> "In sum, the Court finds that information regarding Lemler's scheme with DiGilio would not be exculpatory of Sangemino. Its value for the impeachment of Lemler would have been no more than merely cumulative, and it would have been discretionary with the Court whether to admit

even for the limited purpose of impeachment. Rule 608(b), F.R. Evid." (A. 696a).*

Cf. United States v. *Maxey*, 498 F.2d 474, 486 (2d Cir. 1974).

POINT IV

Sangemino received a spirited and constitutionally adequate defense by his retained counsel.

Sangemino contends, as he did below in a post-trial motion, that he is entitled to a new trial because he was represented by ineffective counsel. On the contrary, as Judge Brieant found, appellant's counsel was adequate and presented a spirited defense against overwhelming evidence.

Shortly after Sangemino's conviction new counsel was substituted for trial counsel. That substitution was quickly folowed by a motion for a new trial based upon the ineffective assistance of counsel. Judge Brieant denied this motion in a scholarly and thorough opinion on which we place primary reliance.**

Sangemino, as he himself recognizes (Br. at 40-41), is not entitled to relief unless trial counsel's performance was so "willfully inadequate as to shock the conscience of the court and make the proceedings a farce and

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* In a related claim, Sangemino contends that Lemler's testimony in New Jersey reveals that he perjured himself in the instant case and that he is therefore entitled to a new trial. The District Court considered this argument as well and found no proof that "the substance of Lemler's testimony was perjured" or that any of the alleged inconsistencies in Lemler's New Jersey and New York trials were material or helpful to the appellant. (A. 697a-89a, 706a).

** The opinion is reproduced at pages 543a-88a of appellant's appendix.

mockery of justice." *United States* v. *Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *United States* v. *Currier*, 405 F.2d 1039, 1043 (2d Cir.), *cert. denied*, 395 U.S. 914 (1968). The trial judge, after having observed the trial firsthand, reviewed the record, applied this standard and concluded that the defendant's allegations did not approach this stringent standard.

Briefly, in deciding the motion, the District Court found that "[i]n sum, the government's case against Major Sangemino was very strong, if the triers of fact viewed Lemler as a credible witness, or considered that they had received substantial evidence to corroborate his relevant testimony" (A. 552a); that the persons the defendant claimed "should have been called as witnesses would not have directly rebutted the Government's case" and their testimony would have been of "dubious relevance and doubtful admissibility" (A. 557a); that while "the questioning of defense witnesses in this trial [would] not stand as a memorable model of trial advocacy, the examination of these witnesses was not so inept to approach the stringent standard by which we appraise the effectiveness of counsel on a motion for a new trial" (A. 560a); and that "[u]pon careful examination of the record and upon consideration of defendant's specific allegations, the court [was of the view] that the claimed errors, taken individually and collectively . . . failed to . . . show inadequacy." (A. 567a).

In response to all of this, Sangemino simply catalogues for this Court precisely the same ten to fifteen claims of incompetence which he raised below. While we do not believe that we can improve on Judge Brieant's thoughtful and complete disposition of these claims, we will briefly touch upon a few of the more emphasized assertions.

First, Sangemino cites an instance wherein defense counsel called for the Government to produce a tape

recording which was a prior consistent statement of one of the Government's witnesses. While the court commented on counsel's doing so in the jury's presence, nonetheless, the tape was admissible and no prejudice to the defendant resulted.

Second, Sangemino points to counsel's offer of the Grand Jury testimony of Leonora Resnick during the Government's case. This incident occurred during the cross-examination of Lemler. While this tactic was "improper," it likely worked to the benefit of the defense, since it suggested to the jury that there was exculpatory evidence about the Resnick case which the Government had not presented. This tactical point was not lost on the trial judge in writing his opinion. (See A. 561a, 587a).

Third, Sangemino cites the fact that counsel was not able to introduce the report that Richard Falcoff had petit mal epilepsy at nine years of age. Based on Falcoff's Grand Jury testimony, pursuing the Falcoff case in this manner could have been a disaster. (A. 563a). As the court pointed out, counsel was able to argue the Falcoff case fully on summation without having to run the risk of putting Falcoff on the stand. (A. 564a).

Fourth, the defendant focuses on the fact that trial counsel failed to submit requests to charge. On considering this issue below, the trial judge felt that submission of a request on only one issue would have been appropriate, *i.e.*, the failure of the Government to produce evidence under its control. The Court also noted that based upon the evidence in the record showing equal unavailability of this evidence, the failure to submit such a charge hardly shocked the court's conscience. (A. 565a).

Also, Sangemino claims that witnesses who were not called should have been and others who were called were

not properly prepared. The witnesses who were not called were a collection of character witnesses and persons who Sangemino assisted in their draft problems without takign money. It is not claimed that any of these witnesses had testimony that directly rebutted Lemler or any other Government witness. Judge Brieant properly refused to second guess trial counsel as to uncalled witnesses. (A. 557a-58a). See *United States ex rel. Walker* v. *Henderson*, 492 F.2d 1311, 1314 (2d Cir. 1974); *United States* v. *Garguilo*, 324 F.2d 795, 797 (2d Cir. 1963). And with respect to those witnesses Sangemino claims would have testified differently if properly prepared, there is not a chance that this testimony would have altered the result. For example, Archie Spiegelman was offered only as an expert in Selective Service matters and had no testimony directly relating to the issues. Evelyn Cohen, Sangemino's secretary for part of the time alleged in the indictment, stated in her post-trial affidavit (A. 464a) that she was not prepared by defense counsel concerning the area of inquiry. This very same woman was interviewed by Government counsel for at least an hour and was *fully* aware of the facts in issue. Aldo D'Ambrosi states that if he had been properly prepared he could have explained away Government Exhibit 4 (Sangemino's business card). However, a reading of D'Ambrosi's testimony reveals that he was evasive about what he had told the Government concerning this subject before being recruited as a defense witness (Tr. 725-28).

All of Sangemino's contentions regarding incompetence of counsel were fully explored by the trial court. After a careful analysis, the judge who presided over the trial held that the defendant had received adequate

assistance of counsel. That holding is clearly correct and most certainly should not be disturbed on appeal.*

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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JEFFREY HARRIS,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys,
of Counsel.

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* Sangemino lastly asserts that his conviction should be reversed because Lemler's testimony in the DiGilio case and in his own defense in Nassau County was so bizarre as to indicate an inveterate perjurer or disordered mind. (Br. Pt. VI). See *Mesarosh* v. *United States*, 352 U.S. 1 (1956). This claim was also raised below and rejected by Judge Brieant. (A. 705a-06a). Moreover, Sangemino's claim that Lemler testified in Nassau County in a bizarre fashion is simply incorrect. The fact is that Lemler did not testify in his own behalf in Nassau County.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Lawrence B Pedowitz being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 22d day of April, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Michael B. Pollack, ESQ.
1345 Avenue of the Americas
New York, N.Y. 10019

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Lawrence B Pedowitz

Sworn to before me this

22 day of April, 1976

Mary L. Avent

MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977